

**BEFORE THE**  
**STATE OF CALIFORNIA**  
**OCCUPATIONAL SAFETY AND HEALTH**  
**APPEALS BOARD**

In the Matter of the Appeal of:

BEHAVIORAL HEALTH SERVICES,  
INC., dba BHS REDGATE MEMORIAL  
RECOVERY CENTER  
1775 Chestnut Avenue  
Long Beach, California 90813

Employer

Docket No. 01-R3D5-3997

**DECISION AFTER  
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken the petition for reconsideration filed in the above-entitled matter by the Division of Occupational Safety and Health (Division) under submission, makes the following decision after reconsideration.

**JURISDICTION**

Commencing on March 20, 2001, a representative of the Division conducted a complaint investigation at a place of employment maintained by Behavioral Health Services, Inc. dba BHS Redgate Memorial Recovery Center (Employer) at 1775 Chestnut Avenue, Long Beach, California (the site). On August 31, 2001, the Division issued a citation to Employer alleging a serious violation of section<sup>1</sup> 5193(f)(3)(B)(1) [blood borne pathogens], with a proposed civil penalty of \$9,000.

Employer filed a timely appeal contesting the existence and the classification of the violation.

On March 19, 2003, a hearing was held before Barbara J. Ferguson, Administrative Law Judge (ALJ), in Torrance, California. Jay Lee, Attorney

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<sup>1</sup> Unless otherwise specified, all section references are to Title 8, California Code of Regulations.

with Fulbright & Jaworski represented Employer. Denise Johnson, Staff Counsel, represented the Division.

On July 10, 2003, the ALJ issued a decision reducing the classification of the violation from serious to general and assessing a civil penalty of \$450.

On August 14, 2003, the Division filed a petition for reconsideration. Employer filed an answer on September 18, 2003. The Board took the Division's petition under submission on October 1, 2003.

On January 2, 2004, the Division filed a motion requesting leave to file a supplemental petition for reconsideration. On March 19, 2004, the Board granted the Division's motion to amend its petition and it was deemed amended (supplemented) as of March 19, 2004 to include the additional language identified in the Division's moving papers.<sup>2</sup> Pursuant to section 392.3, Employer was allowed to file a response (answer) to the amendment no later than 30 days from the service of the March 19, 2004 order. No such answer was filed by Employer.

## **ISSUE**

Did the Division establish a serious violation of section 5193(f)(3)(B)(1)?

## **FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION**

The Board has reviewed the Division's petition for reconsideration as amended, the ALJ's decision, and the record of the proceeding including the tape recordings of the hearing and the exhibits in making this decision after reconsideration. The Board finds that the evidence supports the ALJ's findings of fact. The Board further finds that the ALJ fully and fairly considered the evidence and arguments presented by the parties in deciding the issues. Accordingly, the Board affirms and adopts the ALJ's decision, attached hereto

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<sup>2</sup> The Division moved to add the following to page 3, line 16:

"It is clear from the preamble to the bloodborne pathogen standard (29 CFR Part 1910) that the three main diseases sought to be prevented by compliance with the standard are HIV, HBV, and HCV."

"While it is difficult to state with 100% certainty what portion of all transmissible bloodborne pathogen diseases these three together constitute, it is clear that preventing their transmission is the primary focus of the standard (footnote omitted).

"The Appeals Board should therefore consider a test for the seriousness of a bloodborne pathogen violation that views the transmission of any of these three diseases as the "accident" to which the substantial probability test of Labor Code Section 6432 should be applied when evaluating any violation of the standard involving a practice directly related to the potential transmission of bloodborne pathogen disease. (See *Capri Manufacturing Co, Bas Corporation*, Cal/OSHA App. 83-869, Decision After Reconsideration (May 17, 1985))."

as Exhibit A, including the summary of evidence, rulings, findings, conclusions and reasons for deciding to grant Employer's appeal. The Division's petition for reconsideration raises claims related to the classification of the cited violation. The Board makes the following findings in response to the Division's petition.

All that is at issue in this decision after reconsideration is the classification of the charged violation of section 5193(f)(3)(B)(1) as serious. The evidence and testimony presented by the Division do not leave any doubt that HBV, HCV, and HIV are serious health risks when employees are exposed to blood borne pathogens. The Board appreciates the seriousness of these diseases; yet, the Board is constrained to merge this "seriousness" with a statutory and regulatory definition of "serious violation."

The Division's petition for reconsideration argues that "[t]he Appeals Board [because preventing transmission of blood borne pathogens is the primary focus of the standard] should ... consider a test for the seriousness of a bloodborne pathogen violation that views the transmission of any of these three diseases [HBV, HCV, HIV] as the 'accident' to which the substantial probability test of Labor Code Section 6432 should be applied when evaluating any violation of the standard involving a practice directly related to the potential transmission of bloodborne pathogen disease." [Emphasis added] [Citing *Capri Manufacturing Co., Bas Corporation*, Cal/OSHA App. 83-869 Decision After Reconsideration, (May 17, 1985).]

In *Capri*, the ALJ made a finding that "[s]ince the alleged violation involved a carcinogen the violation was classified as a serious violation." The Appeals Board, in its decision after reconsideration, held that "[s]uch finding would classify as serious any carcinogen violation and is not in accord with the law." [Emphasis added] There, the Board stated that the Carcinogen Act<sup>3</sup> broadens the "serious" classification of violations by adding to the "substantial probability of death or serious injury" test the category of "any violation of a standard or special order respecting the use of a carcinogen."<sup>4</sup> [Emphasis added] There was no use of carcinogens in *Capri*.

The definition of serious violation requires a substantial probability that death or serious physical harm could result from a violation.<sup>5</sup> "Substantial probability" refers not to the probability that an accident or exposure will occur as a result of the violation, but rather to the probability that death or serious physical harm will result assuming an accident or exposure occurs as a result of the violation.<sup>6</sup>

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<sup>3</sup> Health & Safety Code section 24200 *et seq.*, repealed by Stats. 1985, c.947, section 1 and re-enacted as Labor Code section 9000 *et seq.*

<sup>4</sup> Labor Code section 9061

<sup>5</sup> Labor Code, section 6432(a).

<sup>6</sup> Labor Code, section 6432(c).

The violation charged here, which Employer admitted, is a failure to test the source individual's blood following a needle stick injury to an employee.<sup>7</sup> There is no connection between the failure to test this source individual's blood and a substantial probability that death or serious physical harm will befall the exposed employee as a result of that failure to test. The Division's expert witness testified that Employer's failure to test the source individual's blood could not cause hepatitis C, hepatitis B, or HIV. She also testified that *assuming* the source individual here was positive for hepatitis C, B, or HIV, the percentage likelihood that the exposed employee would actually come down with the disease was 2 to 3 percent, less than 20 percent, and about 0.3 percent, respectively. This assumption, of course, is speculative since the blood of the source individual was not tested.

The Division's witness testified that she learned from a conversation with one of the nurses who was present the day of the incident, as well as medical records provided pursuant to a discovery request, that the source individual indicated to the intake nurse at admission to the facility that he had a history of hepatitis B and C, and that he was an intravenous drug user. The Division made no objection to this hearsay evidence. However, no documents were offered in evidence confirming these facts, nor did the intake nurse testify. Based on the percentage likelihood that the exposed employee would actually come down with one of the viruses as indicated above, the Board finds, as did the ALJ, that the Division failed to carry its burden of showing a substantial probability that death or serious physical harm could result from the failure to test the source individual's blood in this case.

The Board is unable to find a serious violation in this case. This is so simply because there can be no causal connection between a failure to test the source individual's blood following a needle stick exposure to an employee and a substantial probability of death or serious physical harm to the exposed employee as a result of such failure to test. *If* the source individual's blood was infected with one or more of the targeted viruses, such condition *might* result in death or serious physical harm to the exposed employee through a needle stick contaminated with the source individual's blood; BUT, the failure to test the source individual's blood as required by section 5193(f)(3)(B)(1) does not result in that substantial probability. It could be said that the contaminated needle stick could result in such a substantial probability, but there was no violation charged as to the needle stick.

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<sup>7</sup> Section 5193(f)(3)(B)(1) provides: "The source individual's blood shall be tested as soon as feasible and after consent is obtained in order to determine HBV, HCV and HIV infectivity. If consent is not obtained, the employer shall establish that legally required consent cannot be obtained. When the source individual's consent is not required by law, the source individual's blood, if available, shall be tested and the results documented."

In the Board's opinion, finding the violation of ***this*** regulation in this case to be a serious violation would be an *ultra vires* act that would cast the Appeals Board in the role of legislating rather than adjudicating.

### **DECISION AFTER RECONSIDERATION**

The ALJ's decision reducing the classification of the violation to general is upheld. The civil penalty assessed is \$450.

ROBERT PACHECO Acting Chair  
MARCY V. SAUNDERS, Member  
JANET M. EAGAN, Deputy Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON: April 14, 2006